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9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
11 **SOUTHERN DIVISION**

12 BIRDDOG TECHNOLOGY LIMITED,
13 an Australian company; and BIRDDOG
14 AUSTRALIA PTY LTD, an Australian
company,

15 Plaintiffs,

16 v.

17 2082 TECHNOLOGY, LLC DBA
18 BOLIN TECHNOLOGY, a California
limited liability company; HOI “KYLE”
19 LO, an individual; and DOES 1 through
25, inclusive,

20 Defendants.

Case No. 2:23-cv-09416 CAS (AGRx)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS’ MOTION TO
DISMISS COMPLAINT**

Hearing Date: February 5, 2024
Time: 1:30 p.m.
Judge: Hon. Christina A. Snyder
Courtroom: 8D

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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 The crux of Plaintiffs' Complaint is the alleged breach of contract to
 3 manufacture cameras for plaintiffs BirdDog Technology Limited ("Bird Dog
 4 Technology") and/or BirdDog Australia Pty Ltd ("BirdDog Australia")
 5 (collectively, "Plaintiffs" or "BirdDog"). Plaintiffs name as defendants 2082
 6 Technology, LLC ("2082") and one of its members Hoi "Kyle" Lo (collectively,
 7 "Defendants"). Through a fantastical and wholly conclusory Complaint, devoid of
 8 even the most basic and essential facts, Plaintiffs also attempt to turn this breach of
 9 contract case into some kind of tortious scheme on the part of Defendants. As
 10 further discussed below, Plaintiffs' allegations are factually deficient and wholly
 11 insufficient to state cognizable claims. More fundamentally, they also are
 12 demonstrably false and contradicted by Plaintiffs' own admissions and judicially
 13 noticeable documents.

14 Just looking at the face of the Complaint, BirdDog fails to allege its claims
 15 consistent with Federal Rule of Civil Procedure 8 and, where applicable, with the
 16 particularity required by Rule 9(b). For example, with respect to its contract
 17 claims, BirdDog fails even to allege the most basic elements of the contracts at
 18 issue, including the identity of the party on its side that allegedly contracted with
 19 and paid money to 2082—*i.e.*, whether it was Bird Dog Technology or BirdDog
 20 Australia—and the specific terms of the contracts that were breached.

21 The Complaint's other claims are similarly void of facts and consist solely of
 22 conclusory allegations. BirdDog's claim for intentional interference, for example,
 23 fails to state which plaintiff had the alleged relationships with which customers, the
 24 identity of these customers, in what way Defendants specifically interfered, which
 25 Defendant specifically interfered, how those relationships were harmed by the
 26 Defendants, and facts demonstrating that the alleged interference was knowing and
 27 intentional, among other deficiencies.

28 Through its Complaint, BirdDog also improperly attempts to transform a
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1 contract case into a tort action by recasting the breach of contract allegations as
 2 conversion, intentional interference, and similar claims. Even assuming the
 3 allegations are true, California law precludes BirdDog from doing so. Specifically,
 4 BirdDog’s non-contract claims are barred by the economic loss doctrine, which
 5 requires that BirdDog base its claims, if any, on a duty independent of the contracts
 6 at issue.

7 Nor can BirdDog cure these deficiencies by amendment for the simple and
 8 fundamental reason that neither 2082 nor Mr. Lo was a party to any alleged contract
 9 with BirdDog. Every one of BirdDog’s claims is founded on the existence of
 10 alleged individual contracts with 2082 that were allegedly breached by 2082,
 11 although BirdDog notably does not attach to the Complaint the purchase orders
 12 themselves or any other writings evidencing these contracts. A review of the actual
 13 purchase orders and wire transfers evidencing BirdDog’s payment of deposit
 14 money for the orders—all of which are incorporated by reference in the
 15 Complaint—make it clear that the contracting party is not 2082, as alleged, but is
 16 instead non-party Bolin Technology Co., Ltd. (“Bolin China”)—a legally separate
 17 Chinese company that Plaintiffs have conveniently failed to name in this lawsuit—
 18 likely to avoid dismissal for lack of personal or subject matter jurisdiction. Because
 19 BirdDog’s claims are all premised on the existence of this contractual relationship
 20 which simply did not exist, BirdDog cannot allege cognizable claims against
 21 Defendants.

22 Accordingly, Defendants request that the Court dismiss all of BirdDog’s
 23 claims for relief.

24 **II. RELEVANT ALLEGATIONS**¹

25 BirdDog alleges in its Complaint that it is “a leading Australian technology
 26 company” which, over the course of many years, “has established itself as one of

27 _____
 28 ¹ Defendants dispute and deny the bulk of the Complaint’s allegations, but accept
 them for purposes of this Motion.

1 the primary global leaders in [pan, tilt and zoom (“PTZ”)] technology”

2 Complaint ¶ 18. Much of BirdDog’s alleged success has apparently been the result
3 of its relationship with its camera manufacturing partner, referred to in the
4 Complaint as “Bolin,” and which relationship, according to the Complaint, dates
5 back to 2018. *Id.* ¶ 21. According to the Complaint, this manufacturing
6 relationship was good for several years and resulted in “Bolin” becoming
7 BirdDog’s principal camera manufacturer. *Id.* ¶ 23.

8 BirdDog alleges that the parties’ business relationship deteriorated in 2023
9 resulting in the alleged breach by “Bolin” of six contracts for the manufacture of
10 cameras, pursuant to which BirdDog claims to have paid over \$3 million in deposit
11 funds. *Id.* ¶¶ 41-46. The Complaint does not allege which BirdDog entity—
12 whether BirdDog Australia or BirdDog Technology—was a party to these alleged
13 contracts and allegedly paid money pursuant to those contracts. In fact, the
14 Complaint does not differentiate between these two corporate plaintiffs in any
15 respect whatsoever, and omits a host of other essential terms of the contracts.

16 Beyond breach of contract, the Complaint alleges various other purported
17 wrongful acts on the part of 2082 and Mr. Lo. Each of these claims derive from
18 and are premised on the alleged contracts, and are equally lacking sufficient
19 allegations.

20 Notably, the Complaint does not attach copies of the purchase orders or other
21 written evidence of these contracts. The purchase orders and wire transfer records
22 reflecting payments made pursuant to the purchase orders, however, are
23 incorporated by reference in the Complaint and are properly the subject of judicial
24 notice. In fact, BirdDog itself filed copies of these documents with the Court in
25 connection with a separate motion it filed on December 15, 2023. *See* Magnuson
26 Decl. Ex. D; *see also* Dkt. 22-1 and 22-2. These documents demonstrate that the
27 contracting party was Bolin China, a China-based manufacturer not named in the
28 Complaint, and not 2082. The purchase orders reflecting these contracts were
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1 addressed by BirdDog to Bolin China’s business address in Shenzhen, China, and,
2 in connection with these orders, BirdDog then wired money to a Chinese bank
3 account belonging to Bolin China (not to 2082). *See* Magnuson Decl. Ex. D.

4 On the other hand, 2082 is, as alleged in the Complaint, a California limited
5 liability company with its principal place of business in Brea, California.
6 Complaint ¶ 10; *see also* Magnuson Decl. Ex. A. Chinese corporate filings, of
7 which the Court may also take judicial notice, reflect that Bolin China is a limited
8 liability company in the business of manufacturing cameras and related equipment,
9 organized under the laws of China, and operating in Shenzhen, China. *Id.* Exs. B,
10 C.

11 **III. ARGUMENT**

12 **A. Plaintiffs Fail to Properly Plead Their Claims and Documents** 13 **Incorporated By Reference and Judicially Noticeable Demonstrate** 14 **That They Cannot Do So.**

15 “To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must
16 contain sufficient factual matter, accepted as true, to state a claim to relief that is
17 plausible on its face. A claim has facial plausibility when the plaintiff pleads
18 factual content that allows the court to draw the reasonable inference that the
19 defendant is liable for the misconduct alleged. . . . Where a complaint pleads facts
20 that are merely consistent with a defendant’s liability, it stops short of the line
21 between possibility and plausibility of entitlement to relief.” *Ashcroft v. Iqbal*, 556
22 U.S. 662, 678 (2009) (internal citations omitted). Moreover, “[a]lthough for the
23 purposes of a motion to dismiss [the Court] must take all of the factual allegations
24 in the complaint as true, [the Court is] not bound to accept as true a legal conclusion
25 couched as a factual allegation.” *Id.*

26 While generally only the allegations in a complaint are considered when
27 deciding a motion to dismiss, “[a] court may, however, consider certain materials—
28 documents attached to the complaint, documents incorporated by reference in the
10

1 complaint, or matters of judicial notice—without converting the motion to dismiss
2 into a motion for summary judgment.” *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir.
3 2003).

4 Under the doctrine of incorporation by reference, the Court may consider
5 documents “whose contents are alleged in a complaint and whose authenticity no
6 party questions, but which are not physically attached to the pleading . . .” *Branch*
7 *v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), overruled on other grounds by
8 *Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). As the Ninth
9 Circuit has explained, “[u]nlike rule-established judicial notice, incorporation-by-
10 reference is a judicially created doctrine that treats certain documents as though
11 they are part of the complaint itself. The doctrine prevents plaintiffs from selecting
12 only portions of documents that support their claims, while omitting portions of
13 those very documents that weaken—or doom—their claims.” *Khoja v. Orexigen*
14 *Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018). The incorporation by
15 reference doctrine extends to documents “crucial to the plaintiff’s claims,” even if
16 not “explicitly incorporated in [the] complaint,” which supports “the policy concern
17 underlying the rule: Preventing plaintiffs from surviving a Rule 12(b)(6) motion by
18 deliberately omitting references to documents upon which their claims are based.”
19 *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998), superseded by statute on
20 other grounds as recognized in *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676,
21 681-82 (9th Cir. 2006). *See also Lloyd v. Facebook, Inc.*, No. 21-CV-10075-EMC,
22 2022 WL 4913347, at *4 (N.D. Cal., Oct. 3, 2022) (on motion to dismiss, granting
23 request to take judicial notice of two contracts necessarily relied on as part of the
24 plaintiff’s breach of contract claim). “The contents of such documents may be
25 assumed to be true for purposes of deciding as Rule 12(b)(6) motion.” *Id.*

26 Here, BirdDog’s purchase orders and wire transfer records—all of which are
27 crucial to, indeed the basis of, BirdDog’s claims—are incorporated by reference in
28 the Complaint. Moreover, there can be no dispute as to their authenticity given that
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1 BirdDog itself offered these precise documents as evidence in support of a separate
2 motion, stating in a declaration under oath from a BirdDog executive that these
3 documents are “true and correct copies of the written portions” of the contracts at
4 issue, “including relevant excerpts of the purchase order and the proof of transfer of
5 funds.” Magnuson Decl. Ex. D, Redacted Canlon Decl. ¶¶ 4-9 and exhibits thereto;
6 *see also* Dkt. 22-1 and 22-2.

7 The Court also may take judicial notice on a motion to dismiss of “matters of
8 public record,” which include the articles of incorporation of a business entity and
9 other publicly available corporate information. *See Lee v. City of Los Angeles*, 250
10 F.3d 668, 688-89 (9th Cir. 2001); *Ryan v. Aegis Specialty Ins.*, No.
11 CV201230CBMSHKX, 2021 WL 6618753, at *2 (C.D. Cal., Nov. 1, 2021) (on
12 motion to dismiss, granting request to take judicial notice of articles of
13 incorporation which contradicted allegations in complaint as to party’s state of
14 incorporation). Here, the Court may consider the publicly available incorporation
15 and organizational documents and information of 2082 and Bolin China.

16 Further, the Court “need not accept as true allegations contradicting
17 documents that are referenced in the complaint or that are properly subject to
18 judicial notice.” *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008);
19 *see also Uyeshiro v. Irongate Azrep BW LLC*, No. CIV. 13-00043 ACK-BM, 2014
20 WL 1233109, at *4 (D. Haw., Mar. 24, 2014) (holding the “Court was not required
21 to take as true Plaintiffs’ allegations that were directly contradicted by the contract
22 documents properly before the Court”).

23 **B. BirdDog Does Not, And Cannot, State Any Claim for Relief**
24 **Against Defendants.**

25 Each of the claims alleged in the Complaint is premised on the existence of
26 alleged contracts between BirdDog and 2082 for the purchase by BirdDog of
27 cameras allegedly manufactured by 2082, and BirdDog’s payment to 2082 of
28 deposits for these orders. *See* Complaint ¶¶ 22-23. The Complaint references six
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1 individual contracts that were allegedly breached by 2082, although BirdDog
2 notably does not actually attach to the Complaint the purchase orders themselves or
3 any other writings evidencing these contracts. *See id.* ¶¶ 24-29. At a minimum,
4 and as further discussed below, BirdDog’s failure to sufficiently allege the
5 existence and terms of the alleged contracts warrants dismissal.

6 As noted above, the Court may properly consider the underlying purchase
7 orders and other documents reflecting the orders, including wire transfers
8 evidencing BirdDog’s payment of money for the orders. These documents make it
9 clear that the contracting party is not 2082, as alleged, but instead is Bolin China, a
10 Chinese-based manufacturing company. *See* Magnuson Decl. Ex. D. Bolin China
11 is a distinct legal entity from 2082, a California based limited liability company.
12 *See* Magnuson Decl. Exs. A-C.² Because BirdDog’s allegations regarding the
13 terms of the contracts—including, importantly, the identity of the party with whom
14 it contracted—are contradicted by the actual contract documents themselves,
15 BirdDog’s allegations can and should be disregarded on this Motion. *See Lazy Y*,
16 546 F.3d at 588; *Uyeshiro*, 2014 WL 1233109, at *4.

17 Because 2082 is not a party to the alleged contracts that form the basis of the
18 Complaint, each of BirdDog’s claims for relief fails. The first claim for relief for
19 breach of contract fails to state a claim because BirdDog cannot properly allege that
20 2082 was a party to the contracts. *See* Complaint ¶¶ 41-46; *see also Barnhart v.*
21 *Points Dev. US Ltd.*, No. 216CV02516CASEX), 2016 WL 3041036, at *3 (C.D.
22 Cal., May 25, 2016) (“a plaintiff cannot maintain a breach of contract claim against
23 an entity who is not a party to the contract”); *Deutsche Bank Nat. Trust Co. v.*
24 *F.D.I.C.*, 784 F. Supp. 2d 1142, 1161 (C.D. Cal., 2011) (dismissing breach of
25 contract claim against nonparty to the agreement). BirdDog’s second claim for
26 relief for breach of the implied covenant of good faith and fair dealing similarly

27 _____
28 ² *See also* Defendants’ Request for Judicial Notice, filed concurrently with this
Motion.

1 fails because “the duty of good faith and fair dealing derives from and exists solely
2 because of the contractual relationship between the parties.” *Wady v. Provident*
3 *Life and Accident Ins. Co. of Am.*, 216 F. Supp. 2d 1060, 1065 (C.D. Cal. 2002).

4 Similarly, BirdDog’s third claim for relief for conversion fails to state a
5 claim because the only alleged act of conversion is 2082’s and Mr. Lo’s purported
6 retention of the initial payments made by BirdDog under the contracts, but the
7 documents show that BirdDog contracted with and made these payments to Bolin
8 China—not 2082 or Mr. Lo—so these allegations may be disregarded. *See*
9 Complaint ¶ 54 (alleging 2082 “has refused to return to BirdDog any of the
10 remaining \$3,060,883 it is now unlawfully withholding.”); *id* ¶ 61 (alleging
11 Defendants “wrongfully misappropriated and unlawfully diverted . . .
12 \$3,060,883.10 for their own personal use”); Magnuson Decl. Ex. D (reflecting
13 contract payments to Bolin China). No facts are alleged that 2082 or Mr. Lo, as
14 opposed to Bolin China, ever received these funds or are wrongfully withholding
15 them. Therefore, as a matter of law, Defendants have not performed any “wrongful
16 act or disposition of property rights,” a necessary element of conversion. *See In re*
17 *Thiara*, 285 B.R. 420, 427 (B.A.P. 9th Cir. 2002) (“[t]he elements of a conversion
18 are the creditor’s ownership or right to possession of the property at the time of the
19 conversion; the debtor’s conversion by a wrongful act or disposition of property
20 rights; and damages.”).

21 For these same reasons, BirdDog’s fourth claim for relief for violation of
22 Penal Code Section 496 and fifth claim for relief for money had and received
23 similarly fail to state claims because BirdDog cannot properly allege that
24 Defendants were ever in receipt of the payments it made to Bolin China.

25 BirdDog’s sixth claim for relief for intentional interference with prospective
26 economic advantage also fails, as the alleged act of interference was the failure to
27 perform under the six contracts. *See* Complaint ¶ 76. However, Defendants were
28 not a party to and had no obligation under these contracts.

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1 Finally, BirdDog’s seventh claim for relief fails to state a claim for violation
2 of California Business and Professions Code Section 17200 (the “UCL”) because
3 BirdDog’s claim is based on the alleged violation of Penal Code Section 496 and
4 alleged misrepresentations regarding the contract, both of which necessarily depend
5 on the existence of a contractual relationship between Defendants and BirdDog,
6 which BirdDog cannot properly allege.

7 Therefore, Defendants submit that the Court should grant their Motion to
8 Dismiss with respect to each of BirdDog’s claims. Moreover, given the lack of
9 contractual relationship between BirdDog and Defendants, any amendment would
10 be futile.

11 **C. BirdDog’s Non-Contract Claims Against Defendants Are Barred**
12 **by the Economic Loss Rule.**

13 Beyond breach of contract and breach of the implied covenant—which are
14 brought only against 2082—the Complaint also alleges claims against 2082 and Mr.
15 Lo for conversion, violation of Penal Code Section 496, money had and received,
16 intentional interference, and violation of the UCL. Each of these claims is a mere
17 extension—indeed, duplicative—of BirdDog’s breach of contract claim. As a
18 result, these claims are barred by the economic loss rule.

19 It is well-established that the economic loss rule under California law
20 mandates that “no tort cause of action will lie where the breach of duty is nothing
21 more than a violation of a promise which undermines the expectations of the parties
22 to an agreement.” *Oracle USA, Inc. v. XL Glob. Servs., Inc.*, No. C 09-00537-
23 MHP, 2009 WL 2084154, at *4 (N.D. Cal., July 13, 2009). Stated another way,
24 “[a] person may not ordinarily recover in tort for the breach of duties that merely
25 restate contractual obligations.” *Aas v. Super. Ct.*, 24 Cal. 4th 627, 643 (2000),
26 superseded by statute on other grounds as recognized in *Rosen v. State Farm Gen.*
27 *Ins. Co.*, 30 Cal. 4th 1070 (2003). Among other things, this doctrine “requires a
28 purchaser to recover in contract for purely economic loss due to disappointed
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1 expectations, unless he can demonstrate harm above and beyond a broken
2 contractual promise.” *Robinson Helicopter Co. v. Dana Corp.*, 34 Cal. 4th 979,
3 988 (2004). Courts have found that the economic loss doctrine bars tort claims
4 when “the damages [a party] seek[s] are the same economic losses arising from the
5 alleged breach of contract.” *Multifamily Captive Group, LLC v. Assurance Risk*
6 *Managers, Inc.*, 629 F. Supp. 2d 1135, 1146 (E.D. Cal. 2009).

7 As the California Supreme Court has noted, this distinction is important in
8 that it prevents “the law of contract and the law of tort from dissolving one into the
9 other.” *Robinson Helicopter*, 34 Cal. 4th at 988. This is precisely what BirdDog
10 attempts to do through its Complaint and is a strategy routinely rejected by courts.
11 In *Darbeevision, Inc. v. C&A Marketing, Inc.*, the plaintiff alleged that the
12 defendant “made ‘false promises . . . to induce plaintiff to enter into the
13 agreement,’” including “statements that [the defendant] would ‘market and promote
14 the product and . . . purchase specified quantities of the product.’” No. SACV 18-
15 00725 AG (SSx), 2018 WL 5880618, at * (C.D. Cal. Aug. 30, 2018) (alterations in
16 original). The court held that the economic loss rule barred this claim because
17 “[t]hese promises are identical to [the defendant’s] duties under the contract.” *Id.*
18 “[A]lleg[ing] that Defendants promised to do something and didn’t do it . . . [is] not
19 enough for tort damages.” *Id.*

20 Similarly, in *Motivo Engineering, LLC v. Black Gold Farms*, No.
21 222CV01447CASJCX, 2022 WL 3013227, at *4 (C.D. Cal. June 27, 2022), this
22 Court dismissed a conversion counterclaim where the defendant’s ownership
23 interest in the converted property arose solely from the agreement at issue in the
24 case. Despite allegations by the defendant that went beyond mere breach of
25 contract, including that the plaintiff held the property “hostage” and damaged the
26 property, the Court held that the property rights nonetheless “flowed from contract”
27 and were, therefore, barred by the economic loss rule. *Id.* See also *Amuchie v.*
28 *JPMorgan Chase Bank N.A.*, No. 2:22-CV-07621-AB-JPR, 2023 WL 2559201, at
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*4 (C.D. Cal. Feb. 9, 2023) (dismissing conversion claim on the ground that “[t]he conduct Plaintiff complains of in its conversion cause of action is the same conduct that forms the basis of Plaintiff’s, albeit poorly plead, breach of contract claim. Therefore, the claim is barred.”).

Here, the entire basis for BirdDog’s claims for conversion, Penal Code violations, and money had and received is that 2082 and Mr. Lo purportedly received and retained the initial payments made by BirdDog under the contracts without delivering product—*i.e.*, an alleged breach of the contracts. *See* Complaint ¶¶ 61-62, 67-68, 72. The damages sought for these tort claims are the same damages sought in connection with BirdDog’s breach of contract claim, the alleged \$3,060,883.10 paid pursuant to the contracts. *See id.* Similarly, BirdDog’s claim for intentional interference is based on 2082’s and Mr. Lo’s alleged failure to deliver cameras under the contracts—*i.e.*, an alleged breach of the contracts. *See id.* ¶ 76. To allow BirdDog’s tort claims to proceed in these circumstances would improperly grant claimants a license to turn a commercial breach of contract case into a tort case, which is inconsistent with California law. *See, e.g., United Guar. Mortg. Indem. Co. v. Countrywide Fin. Corp.*, 660 F. Supp. 2d 1163, 1180 (C.D. Cal. 2009) (noting the economic loss rule “is particularly strong when a party alleges ‘commercial activities that negligently or inadvertently [went] awry.’”), quoting *Robinson Helicopter Co.*, 34 Cal. 4th at 991, n.7.

Accordingly, the economic loss rule bars BirdDog’s non-contract claims against Defendants.

D. Each Claim for Relief Alleged in the Complaint Should Be Dismissed for Failure to State a Claim.

Even if the Court were to accept the Complaint’s mistaken or outright false allegations that 2082 is the party with which it contracted, BirdDog’s claims against Defendants should still be dismissed for failure to state a claim under Rules 8 and 9(b), as applicable.

1 **1. The First Claim for Relief for Breach of Contract Fails to**
2 **State a Plausible Claim Against 2082.**

3 BirdDog’s first claim for relief is for breach of contract by 2082. Even
4 assuming 2082 was the proper party to this claim—which, as explained above, it
5 most certainly is not—BirdDog still has not sufficiently pleaded this claim for
6 relief. “To successfully prove a breach of contract claim, [the plaintiff] has the
7 burden of establishing the following elements: (1) existence of the contract, (2)
8 performance by the plaintiff or excuse for nonperformance, (3) breach by the
9 defendant, and (4) damages.” *Tom Trading, Inc. v. Better Blue, Inc.*, 26 Fed. Appx.
10 733, 735 (9th Cir. 2002). In alleging the existence of the contract, a “plaintiff may
11 set forth the contract verbatim in the complaint or plead it, as indicated, by exhibit,
12 or plead it according to its legal effect.” *Buchanan v. Neighbors Van Lines*, No.
13 CV 10 6206 PSG (RCx), 2010 WL 4916644, *5 (C.D. Cal. Nov. 29, 2010). To
14 plead a contract’s legal effect, a plaintiff must “allege the substance of its relevant
15 terms,” which is more difficult than pleading the contract’s precise language
16 because it “requires a careful analysis of the instrument, comprehensiveness in
17 statement, and avoidance of legal conclusions.” *See Parrish v. NFL Players Ass’n*,
18 534 F. Supp. 2d 1081, 1094 (N.D. Cal. 2007).

19 Here, the Complaint fails to meet these standards. Indeed, the Complaint
20 does not even allege the identity of the parties to the contracts at issue. Rather, the
21 Complaint lumps BirdDog Technology and BirdDog Australia together without
22 specifying which entity was a party to the alleged contracts and which party paid
23 money to 2082.

24 Moreover, BirdDog fails to allege the contracts’ terms, including what
25 provisions of the relevant contracts were breached by 2082 and how. Instead, the
26 Complaint alleges as a mere legal conclusion that the manufacturer failed “to timely
27 produce” units and failed “to meet promised delivery dates” (Complaint ¶¶ 48-53),
28 but does not specify what production and delivery dates were ever agreed to be met
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1 by the contracting parties. The Complaint also conclusorily states that 2082
2 “fail[ed] to provide units of acceptable and/or merchantable quality” (*id.*), but does
3 not allege in what way the goods were supposedly not acceptable and not of
4 merchantable quality, or even what the alleged contracts provided for in that regard.

5 Finally, BirdDog also alleges as a mere legal conclusion that it performed
6 under the contract or was excused. On this element, the Complaint merely alleges
7 that “BirdDog has fully performed all conditions, covenants and promises required
8 to be performed on its part in accordance with [the contracts], including through the
9 payment of all required prepayments and otherwise, except to the extent that its
10 performance was waived, excused or prevented by Bolin.” Complaint ¶ 47. To
11 begin with, BirdDog does not allege what conditions, covenants, and promises were
12 provided for under the contracts. Disregarding the legal conclusions, the sole
13 factual allegation is that BirdDog made the required prepayments under the
14 contract. However, BirdDog admits that the prepayment was only 30% of the
15 contract price for five of the contracts and 50% of the other. *Id.* ¶¶ 41-46. The
16 Complaint fails to allege that BirdDog had no duty to make the remaining payments
17 as a condition of delivery or that BirdDog was excused from making the remaining
18 payments. Therefore, at best, the allegations are merely consistent with liability,
19 but do not reach the level of plausibility required to survive a motion to dismiss.
20 *See Iqbal*, 556 U.S. at 678.

21 Accordingly, the first claim for relief against 2082 for breach of contract
22 should be dismissed.

23 **2. The Second Claim for Relief for Breach of the Implied**
24 **Covenant Fails to State a Plausible Claim and Is Not**
25 **Pleaded With Specificity.**

26 The Complaint alleges that 2082 breached the implied covenant of good faith
27 and fair dealing by allegedly failing to deliver the cameras and by alleging failing to
28 refund the prepayment. Complaint ¶ 58. As discussed above, the Complaint does
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1 not allege facts as to the identity of the contracting parties, the promised production
2 and delivery dates, the specific alleged issues with the quality of the products, or
3 the basis, if any, for BirdDog’s purported claim that it was excused from making
4 the full payment prior to delivery. Therefore, to the extent that the second claim for
5 relief arises from these allegations, it should likewise be dismissed.

6 Additionally, BirdDog’s breach of the implied covenant claim fails because it
7 is duplicative of BirdDog’s breach of contract claim. The Complaint alleges, for
8 example, that 2082 withheld performance under the parties’ alleged contracts,
9 allegedly frustrated BirdDog’s receipt of benefits under the contracts, and allegedly
10 repudiated the contracts—all of which is also claimed by BirdDog to be a breach of
11 contract. *Id.* A claim for breach of the implied covenant which is merely a
12 recasting of a breach of contract claim is subject to dismissal. As explained by the
13 court in *Hougue v. City of Holtville*, No. 07CV2229 WQH (WMC), 2008 WL
14 1925249, at *4 (S.D. Cal., Apr. 30, 2008), “[i]f the allegations [of breach of the
15 implied covenant] do not go beyond the statement of a mere contract breach and,
16 relying on the same alleged acts, simply seek the same damages or other relief
17 already claimed in a companion contract cause of action, they may be disregarded
18 as superfluous as no additional claim is actually stated.” *Id.*, quoting *Careau &*
19 *Co. v. Sec. Pac. Bus. Credit, Inc.* 222 Cal. App. 3d 1371, 1401 (1990).

20 Moreover, this claim fails to meet the heightened pleading requirements of
21 Rule 9(b). “Rule 9(b) applies when (1) a complaint specifically alleges fraud as an
22 essential element of a claim, (2) when the claim ‘sounds in fraud’ by alleging that
23 the defendant engaged in fraudulent conduct, but the claim itself does not contain
24 fraud as an essential element, and (3) to any allegations of fraudulent conduct, even
25 when none of the claims in the complaint ‘sound in fraud.’” *TransFresh Corp. v.*
26 *Ganzerla & Assoc., Inc.*, 862 F. Supp. 2d 1009, 1016 (N.D. Cal. 2012). Here, the
27 Complaint alleges that 2082, in breach of the covenant of good faith and fair
28 dealing, “knowingly, intentionally and in bad faith induc[ed] BirdDog to agree to
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1 pay millions of dollars to Bolin when Bolin never intended to provide what
2 BirdDog was entitled to receive in exchange.” Complaint ¶ 58. This contention
3 sounds in fraud. And not only is this claim belied by other allegations in the
4 Complaint—including that, until 2023, years after the alleged orders at issue were
5 placed, “Bolin met BirdDog’s manufacturing requirements” (*id.* ¶ 23)—the
6 allegations also are not specifically pleaded.

7 As the court in *UMG Recordings, Inc. v. Global Eagle Entertainment, Inc.*,
8 117 F. Supp. 3d 1092 (C.D. Cal. 2015), noted, “[w]here fraud has allegedly been
9 perpetrated by a corporation, . . . plaintiffs must allege the names of the employees
10 or agents who purportedly made the fraudulent representations or omissions, or at a
11 minimum identify them by their titles and/or job responsibilities.” *Id.* at 1108.
12 Other pleading requirements include the employees’ “authority to speak, to whom
13 they spoke, what they said or wrote, and when it was said or written.” *Id.*, citing
14 *Arch Ins. Co. v. Allegiant Prof’l Bus. Servs., Inc.*, No. CV 11-1675 CAS PJWX,
15 2012 WL 1400302, at *3 (C.D. Cal., Apr. 23, 2012). *See also Bullard v.*
16 *Wastequip, Inc.*, No. CV1401309MMMSSX, 2014 WL 10987394, at *6 (C.D. Cal.,
17 Sept. 11, 2014) (granting motion to dismiss for lack of specificity because plaintiff
18 merely alleged that a corporation made fraudulent representations without alleging
19 the names or titles of the employees or agents who made those representations).

20 Here, the Complaint fails to allege fraud with specificity in multiple ways.
21 First, the Complaint fails to allege to whom at BirdDog the “inducing”
22 representations were made or even to which BirdDog entity. Second, the
23 Complaint fails to allege the specific representations made regarding delivery dates,
24 as well as that BirdDog allegedly did not need to make the full payment prior to
25 delivery—the very representations upon which BirdDog relies to establish liability.
26 *See* Complaint ¶¶ 24-29. Third, the Complaint does not allege if Mr. Lo was the
27 only person to make representations or if someone else on behalf of 2082 also made
28 representations. *See id.* ¶ 24 (“in reliance on Bolin’s and Mr. Lo’s representations .
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1 . ..”).

2 Therefore, the second claim for relief against 2082 for breach of the implied
3 covenant should be dismissed.

4 **3. The Third Claim for Relief for Conversion Fails to State a**
5 **Plausible Claim and Is Not Pleaded With Specificity.**

6 BirdDog’s third claim for relief for conversion, which is alleged against both
7 2082 and Mr. Lo, arises from BirdDog’s partial payment under the contracts which,
8 according to the Complaint, Defendants have refused to refund. “The elements of a
9 conversion are the creditor’s ownership or right to possession of the property at the
10 time of the conversion; the debtor’s conversion by a wrongful act or disposition of
11 property rights; and damages.” *In re Thiara*, 285 B.R. at 427. Where, as here, the
12 alleged conversion is grounded in fraud, these elements must be pleaded with
13 specificity under Rule 9(b). *See Talece Inc. v. Zheng Zhang*, No. 20-CV-03579-
14 BLF, 2020 WL 6205241, at *5 (N.D. Cal. Oct. 22, 2020) (“merely reciting the
15 elements of what constitutes conversion is not a substitute for pleading with
16 particularity when fraud has been averred.”).

17 There can be no dispute that BirdDog’s conversion claim is grounded in
18 fraud. The Complaint alleges, among other things, that 2082 and Mr. Lo “work[ed]
19 together to parlay BirdDog’s trust and confidence into a wrongful scheme” which
20 involved inducing BirdDog to enter into contracts “Bolin had no intention of
21 performing as agreed” (Complaint ¶ 23), and that the funds ultimately received
22 under the contracts were then “knowingly and intentionally received, concealed or
23 withheld . . . and otherwise unlawfully maintained.” *Id.* ¶ 67. Missing from the
24 Complaint, however, is any specificity as to the source of the funds at issue—
25 whether, for example, they are BirdDog Australia or BirdDog Technology’s
26 funds—as well as any differentiation between 2082 and Mr. Lo. On this last point,
27 the Complaint also is deficient in that it is not clear whether BirdDog is alleging
28 that Mr. Lo himself personally diverted funds or, on the other hand, whether it is
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1 being alleged that he acted on behalf of 2082. In addition, BirdDog also alleges
2 that there has been an improper “use” of the funds, but this use is not alleged, nor is
3 it clear whether this alleged use of funds was by 2082 or Mr. Lo personally. It is
4 implausible that two parties jointly converted the same funds and that two parties
5 simultaneously possess those same funds and/or have jointly used them. Moreover,
6 because this claim necessarily depends on a threshold breach of contract, which
7 BirdDog fails to properly plead as argued above in Section III.D.1, the Complaint
8 fails to allege facts that show that the alleged retention of the payments was
9 wrongful. In short, this claim does not meet Rule 9(b)’s pleading requirements.

10 Therefore, this claim fails and should be dismissed.

11 **4. The Fourth Claim for Relief for Violation of Penal Code**
12 **Section 496 Fails to State a Plausible Claim and Is Not**
13 **Pleaded with Specificity.**

14 A violation of California Penal Code Section 496(a) requires the moving
15 party to demonstrate that “(i) the property was stolen or obtained in a manner
16 constituting theft, (ii) the defendant knew the property was so stolen or obtained,
17 and (iii) the defendant received or had possession of the stolen property.” *Grouse*
18 *River Outfitters, Ltd. v. Oracle Corp.*, 848 Fed. Appx. 238, 242 (9th Cir. 2021).
19 Importantly, “[n]ot all commercial or consumer disputes alleging that a defendant
20 obtained money or property through fraud, misrepresentation, or breach of a
21 contractual promise will amount to a theft. To prove theft [by false pretenses under
22 Section 496], a plaintiff must establish criminal intent on the part of the defendant
23 beyond ‘mere proof of nonperformance or actual falsity.’” *Siry Inv., L.P. v.*
24 *Farkhondehpour*, 13 Cal. 5th 333, 361-62 (2022). The alleged misrepresentations
25 at issue must be “made knowingly and with intent to deceive.” *People v. Ashley*, 42
26 Cal. 2d 246, 264 (1954).

27 Further, as BirdDog’s claim under Penal Code Section 496 necessarily relies
28 on a claim of theft by false pretenses, this claim sounds in fraud and must be
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1 pleaded with specificity. *See River Supply, Inc. v. Oracle Am., Inc.*, No. 3:23-CV-
2 02981-LB, 2023 WL 7346397, at *17 (N.D. Cal., Nov. 6, 2023) (holding that a
3 failure to plead fraud with specificity results in a failure to plead a Penal Code 496
4 claim).

5 For the same reasons argued above (*see* Sections III.D.2-3), the Complaint
6 fails to allege the elements of this claim, which is grounded in fraud, with
7 specificity. The Complaint merely alleges as a legal conclusion, without any
8 factual support, that 2082 and Mr. Lo stole the funds that BirdDog paid pursuant to
9 the six contracts at issue. The Complaint contains no allegations of fact to
10 demonstrate that either 2082 or Mr. Lo made any representations to BirdDog
11 knowingly or with an intent to deceive BirdDog to pay this money, nor that there
12 was any intent to steal it.³ Nor does the Complaint distinguish between Mr. Lo's
13 alleged conduct and 2082's alleged conduct, preferring to treat them as one and the
14 same, which is of course impermissible pleading under Rule 9(b).

15 Therefore, this claim fails and should be dismissed.

16 **5. The Fifth Claim for Relief for Money Had and Received**
17 **Fails to State a Plausible Claim and Is Not Pleaded With**
18 **Specificity.**

19 “For a claim of money had and received, a plaintiff must show: ‘(1)
20 defendant received money; (2) the money defendant received was for plaintiff's
21 use; and (3) defendant is indebted to plaintiff.’” *Maksoud v. Hopkins*, No. 17-CV-
22 00362-H-WVG, 2018 WL 5920036, at *8 (S.D. Cal., Nov. 13, 2018). BirdDog's
23 claim arises from and relies on a breach of contract, as BirdDog alleges that 2082
24 and Mr. Lo refused to refund the initial payments on the six contracts. *See*
25 Complaint ¶ 70. Because BirdDog fails to state a claim for a breach of contract,
26 this claim for relief fails to state a plausible claim as well and should be dismissed
27 under Rule 12(b)(6). Similarly, for the same reasons BirdDog's third and fourth

28 ³ As discussed above, neither 2082 nor Mr. Lo received any money from BirdDog.
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claims are not pleaded with specificity, this claim also fails.

6. The Sixth Claim for Relief for Intentional Interference Fails to State a Plausible Claim and Is Not Pleaded With Specificity.

“To plead a claim for intentional interference with prospective business advantage, a plaintiff must allege ‘(1) a specific economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff; (2) knowledge by defendant of the existence of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) damages proximately caused by the defendant’s acts.’” *UMG Recs.*, 117 F. Supp. 3d at 1116.

Here, the Complaint is once again devoid of facts and heavy on legal conclusions. BirdDog fails to allege any facts regarding, among other things, any specific economic relationships with third parties, the identity of these purported third parties, why the relationship with these parties contained a probability of future economic benefits, how 2082 and Mr. Lo each knew about these purported relationships, how the alleged failure to deliver cameras disrupted these relationships, how 2082 and Mr. Lo each specifically and separately interfered, and how BirdDog was allegedly damaged as a result. Therefore, the Complaint fails to plead a claim for interference with prospective economic advantage.

7. The Seventh Claim for Relief for Violation of the UCL Is Not Pleaded with Specificity and Is Otherwise Improper.

The Complaint alleges that 2082 and Mr. Lo each individually committed UCL violations which allegedly damaged BirdDog. The UCL “defines ‘unfair competition’ to include ‘any unlawful, unfair or fraudulent business act or practice.’” *Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999), quoting Cal. Bus. & Prof. Code § 17200. “A breach of contract may form the basis for UCL claims only if it also constitutes conduct that is unlawful, or

1 unfair, or fraudulent.” *Conder v. Home Sav. of Am.*, 680 F. Supp. 2d 1168, 1176
2 (C.D. Cal. 2010). Here, the Complaint alleges that Defendants violated the UCL by
3 violating Penal Code Section 496 and by engaging in other allegedly fraudulent
4 activity. *See* Complaint ¶ 80.

5 The Ninth Circuit has noted that “UCL claims premised on fraudulent
6 conduct trigger the heightened pleading standard of [Rule] 9(b), which requires a
7 plaintiff to state the circumstances constituting fraud (or the claim ‘sound[ing] in
8 fraud’) ‘with particularity.’” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th
9 Cir. 2009) (citations omitted); *see also Davidson v. Kimberly-Clark Corp.*, 889 F.3d
10 956, 964 (9th Cir. 2018) (finding UCL and other claims were “grounded in fraud”);
11 *Williamson v. McAfee, Inc.*, No. 5:14-CV-00158-EJD, 2014 WL 4220824, at *6
12 (N.D. Cal., Aug. 22, 2014) (“Rule 9(b)’s heightened pleading standard applies to all
13 UCL and FAL claims that are grounded in fraud.”).

14 For the reasons set forth above (*see* Sections III.D.2-3), the Complaint fails
15 to specifically plead its fraud allegations, so the UCL claim likewise fails. *See*
16 *McMillan v. Connected Corp.*, No. CV 10-03297 MMM, 2011 WL 13213945, *10
17 (C.D. Cal., May 18, 2011) (“Plaintiffs’ allegations do not state an adequate claim
18 under the UCL because they rely on purportedly fraudulent conduct but do not
19 satisfy the heightened pleading requirements of Rule 9(b).”).

20 Additionally, “[w]here a UCL action is based on contracts not involving
21 either the public in general or individual consumers who are parties to the contract,
22 a corporate plaintiff may not rely on the UCL for the relief it seeks.” *Linear Tech.*
23 *Corp. v. Applied Materials, Inc.*, 152 Cal. App. 4th 115, 135 (2007). Cases
24 applying *Linear Technology* have recognized that “a dispute between commercial
25 parties over their economic relationship” does not give rise to a UCL claim.
26 *ChromaDex, Inc. v. Elysium Health, Inc.*, 301 F. Supp. 3d 963, 975 (C.D. Cal.
27 2017). For instance, in *Pierry, Inc. v. Thirty-One Gifts, LLC*, the court noted, “[t]he
28 UCL may be used to vindicate the rights of individual consumers who are parties to

1 a contract, but it is not generally appropriate for resolving sophisticated business
2 finance issues.” No. 17-cv-03074-MEJ, 2017 WL 4236934, at *7 (N.D. Cal., Sept.
3 25, 2017); *see also Open Text, Inc. v. Northwell Health, Inc.*, No. 2:19-cv-09216-
4 SB-AS, 2021 WL 1235254, at *4 (C.D. Cal., Feb. 19, 2021) (dismissing UCL
5 counterclaim asserted by “large, sophisticated corporate entity” that did not need to
6 resort to the UCL “to remedy its business-to-business contractual dispute”);
7 *Nnydens Int’l, Inc. v. Textron Aviation, Inc.*, No. CV 18-9455-DMG (SKX), 2020
8 WL 7414732, at *8 (C.D. Cal., June 11, 2020) (granting summary judgment on
9 UCL claim because action was a “dispute between commercial parties over their
10 economic relationship”).

11 BirdDog is a publicly traded and self-proclaimed “leading Australian
12 technology company,” and one of the “primary global leaders in PTZ technology.”
13 Complaint ¶ 18. A sophisticated corporate party like this is not the sort of entity
14 that is legally entitled to invoke the UCL to remedy a business-to-business
15 contractual dispute. This Court should therefore dismiss this claim.

16 **IV. CONCLUSION**

17 For all of the reasons set forth herein, Defendants request that the Court
18 dismiss all of the Complaint’s claims for relief for failure to state a claim.

20 Dated: December 22, 2023

UMBERG ZIPSER LLP

21
22 s/ Molly J. Magnuson
Molly J. Magnuson
23 Attorneys for Defendants 2082
24 Technology, LLC dba Bolin
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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendants, certifies that this brief contains 6835 words, which complies with the word limit of L.R. 11-6.1.

Dated: December 22, 2023

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